No. 266

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

CENTRAL-ILLINOIS SECURITIES CORPORATION and CHRISTIAN A. JOHNSON

v.

SECURITIES AND EXCHANGE COMMISSION, THOMAS W. STREETER, *et al.*, THE HOME INSURANCE CO., *et al.*

MEMORANDUM OF COMMON STOCKHOLDERS LUCILLE WHITE AND FRANCES BOEHM IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

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Lucille White and Frances Boehm, common stockholders of Engineers, pray that the petition of common stockholders Central-Illinois Securities Corporation and Christian A. Johnson, for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit be granted.

Lucille White and Frances Boehm are respondents with respect to three petitions for certiorari to review the same judgment (Nos. 226, 227, 243) and have filed a brief in opposition to said petitions.

Opinions Below

The opinion and judgment of the Court below (R. 12) and the opinion denying petitions and cross-petitions for rehearings (R. 138) are reported at 168 F. 2d 722. The opinion of the District Court is reported at 71 F. Supp. 797 (R. 283a), but its detailed Findings of Fact and Conclusions of Law (R. 293a-317a) are not reported. The Findings and Opinion of the Commission dated December 4, 1946 and January 8, 1947 have not yet been officially reported but are set forth in the Commission's Holding Company Act Releases Nos. 7041 (R. 25a) and 7119 (R. 128a).

Jurisdiction

The judgment of the Circuit Court of Appeals for the Third Circuit was entered March 19, 1948, and its judgment denying petitions and cross-petitions for rehearing was entered June 11, 1948. The jurisdiction of this Court is invoked under Section 240 of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. 347), made applicable by Section 25 of the Public Utility Holding Company Act of 1935, 49 Stat. 803 (15 U. S. C. 79, *et seq.*).

Statute Involved

Section 11(e) of the Public Utility Holding Company Act of 1935 provides as follows:

> "(e) In accordance with such rules and regulations or order as the Commission may deem necessary or appropriate in the public interest or for the protection of investors or consumers, any registered holding company or any subsidiary company of a registered holding company may, at any time after January 1,

1936, submit a plan to the Commission for the divestment of control, securities, or other assets, or for other action by such company or any subsidiary company thereof for the purpose of enabling such company or any subsidiary company thereof to comply with the provisions of subsection (b). If, after notice and opportunity for hearing, the Commission shall find such plan, as submitted or as modified, necessary to effectuate the provisions of subsection (b) and fair and equitable to the persons affected by such plan, the Commission shall make an order approving such plan; and the Commission, at the request of the company, may apply to a court, in accordance with the provisions of subsection (f) of section 18, to enforce and carry out the terms and provisions of such plan. If, upon any such application, the court, after notice and opportunity for hearing, shall approve such plan as fair and equitable and as appropriate to effectuate the provisions of section 11, the court as a court of equity may, to such extent as it deems necessary for the purpose of carrying out the terms and provisions of such plan, take exclusive jurisdiction and possession of the company or companies and the assets thereof, wherever located; and the court shall have jurisdiction to appoint a trustee, and the court may constitute and appoint the Commission as sole trustee, to hold or administer, under the direction of the court and in accordance with the plan theretofore approved by the court and the Commission, the assets so possessed."

Reasons Relied On For Allowance of Writ

The determination of the Circuit Court directing a remand to the Commission raises issues of substantial importance in the administration of the Public Utility Holding Company Act and directly affects the rights of

many stockholders. If the petitions of appellants for a writ is granted, it is particularly important that this petition be granted in order that this Court may have before it all of the issues raised in this case for a complete determination.

I.

The District Court merely followed the procedure mapped out by the Commission in the event that the District Court found that the preferred stock was not entitled to the redemption premium, and remand to the Commission was unnecessary.

The Circuit Court of Appeals, after affirming the determination of the District Judge that the plan as submitted by the Commission was unfair and inequitable, vacated the decree of the District Judge and remanded the cause to the Commission solely on the ground that the District Judge erred in approving and enforcing the plan as amended by him.

The statement by the Circuit Court on this point is as follows (R. 39):

> "To put the matter briefly, a district court may reject but not amend the plan. The court below, therefore, erred in one particular. It entered an order approving and enforcing the plan as amended by it. It was without power to do this. The provisions of Section 11 (e) make it clear that the Commission in the first instance must approve the plan and find it to be fair and equitable. If, as here, the District Court disagrees with the conclusion of the Commission that the plan is fair and equitable, it must

refuse to approve the plan and remand the record to the Commission for further and appropriate action by it."

In this respect we believe that the Circuit Court is in error. The District Court did not amend the plan. The only question before the District Court was whether the preferred stockholders were entitled to the redemption premium provided by the Engineer's charter to be paid in the event of a voluntary redemption or liquidation. The rest of the plan was not in dispute, and has already been carried out. The amount of this premium, plus expenses, was deposited in Court subject to the determination of that question. The District Court found that it would be unfair and inequitable to pay such redemption premium.

All of the proceedings concerning the amendment of the plan, the provisions for an escrow agreement and the submission to the District Court, were ordered by the Commission, and contemplated and provided for the contingency that the District Court might, as indeed it did, find that the payment of $100 per share plus accrued dividends to the preferred stockholders was fair and equitable and that the payment in excess of $100 per share plus accrued dividends was not fair and equitable, which finding was affirmed by the Circuit Court of Appeals. And it was in accordance with that amended plan as approved by the Commission and the District Court that the preferred stockholders have received $100 per share, plus accrued dividends, and that the amount of the premiums has been deposited in escrow.

That the determination of the courts as to whether or not the preferred stockholders should receive more than $100 per share, should be binding upon the Commission, and that the Commission had thereby given advance ap-

proval, is amply borne out by the record. In its Order of Amendment dated February 11, 1947 (H. C. A. Release No. 7490, R. 165a), the Commission approved payment to the holders of the preferred stock of $100 per share and such additional amounts as may be directed by an order or decree of the United States District Court or any appellate court (R. 174a). Thereafter the Commission approved and joined in presenting to the District Court the escrow agreement, the pertinent provision of which states that the amount of the premium which is deposited in escrow shall be released and paid over to Engineers upon proof of the entry of an order or decree of the Commission, or of an order or decree of any court having jurisdiction, which determines or finds that the holders of the preferred stock are not entitled to receive any amounts in excess of $100 per share plus accrued dividends (R. 328a).

And in oral argument before the District Court in answer to the statement by Mr. Tucker, counsel for Engineers, that if the District Court did not approve the plan in its entirety, it goes back to the Commission, Mr. Slater, counsel for the Commission, stated (R. 281a):

> "If your Honor please, I hesitate to do so, but we must disagree with the statement just made by Mr. Tucker. As we view this escrow, it is a two way escrow. The Commission or the preferred stockholders might appeal in the event that this Court should determine only one hundred dollars is payable. The common stockholders have indicated they would appeal if the Court agreed with the determination of the Commission. But certainly the reorganization process and equity powers of this Court can't be so inflexible that this Court can't by appropriate order approve those portions of a plan which are clearly separable and in no way impinge on the controverted

> portions of a plan. * * * It is just silly to upset ten-elevenths of this plan, at least that, if not ninety-nine one-hundredths, simply because there is a disagreement as to a segregated small portion in relation to the whole of what we are doing here."

That the Commission has consistently maintained this position is apparent from its petition for rehearing in the Circuit Court where the Commission stated (R. 44, note 1):

> "* * * the Commission has already contingently approved an alternative allocation of cash to preferred stockholders at the amount of the liquidation preference if as a result of the processes of review in the District Court and on appeal therefrom this should be judicially determined fair and equitable."

It is thus apparent that not only has the District Court not amended the plan, but has in fact followed a procedure which has been concurred in and approved by the Commission. The procedures and decisions of the Commission and the District Court have fully satisfied the statutory requirement for approval of the plan by the Commission and the enforcing Court.

II.

Should certiorari be allowed, the Court should likewise permit certiorari to review the question, undecided up to now, whether upon a true liquidation under the Holding Company Act, the charter provisions of the corporation to be liquidated, are controlling.

It is further contended by respondents Lucille White and Frances Boehm that the charter provisions in this case are applicable and that the overriding of these charter

provisions is not reasonably necessary to effectuate the provisions of the Holding Company Act, and thereby constitutes a violation of the Fifth Amendment.

The applicable section of the corporate charter of Engineers provides:

> "III. Preference on liquidation, etc. In the event of liquidation, dissolution or winding up of this Corporation, or any reduction of its capital stock, resulting in any distribution of its assets to its stockholders, the holders of the preferred stock of each series shall be entitled to receive, for each share thereof, an amount equal to $100, together with all dividends accrued or in arrears thereon, plus, in case such liquidation, dissolution or winding up or reduction shall have been voluntary, the fixed redemption premium for such series, if any, before any distribution of its assets shall be made to the holders of the common stock * * *."

Not only has the Commission conceded that the dissolution in this case is not voluntary, but the District Court found that a plan, whether submitted by the company or the Commission, is not a voluntary plan (R. 287a, note 1).

The case of *Otis & Co.* v. *Securities and Exchange Commission*, 323 U. S. 624 (1945), relied on by the Commission in the lower courts as dispositive of this issue is clearly distinguishable. In the Otis case, there was involved a mere simplification and reorganization of a continuing holding company system, in fact only the removal of the top holding company (the lower tier of holding companies remaining and the enterprise continuing), whereas the Engineers case involves a final and complete liquidation, which in fact has already been accomplished.

This distinction is emphasized by this Court in the Otis case when it said that (p. 631):

> "* * * The exercise of legislative power by Congress through §11 (b) (2) to accomplish *simplification* as a matter of public policy and the Commission's administration of the Act *by dissolution of this particular company* results in a type of liquidation which is entirely distinct from the 'liquidation of the corporation, whether voluntary or involuntary' envisaged by the charter provisions of Power for preferences to the senior stock." (Italics supplied).

The provision of the corporate charter providing for payment of a fixed amount to the preferred stockholders in the event of an involuntary dissolution constitutes a contract among the stockholders which is entitled to constitutional protection.

Bedford v. *Eastern Building & Loan Association*, 181 U. S. 227, 21 S. Ct. 597, 45 L. Ed. 834.

Hopkins Federal Savings & Loan Association v. *Cleary*, 296 U. S. 315, 56 S. Ct. 235, 80 L. Ed. 251.

Treigle v. *Acme Homestead Association*, 297 U. S. 189, 194, 196, 56 S. Ct. 408, 80 L. Ed. 575.

And in this connection, the language of the minority in the Otis case is particularly appropriate (p. 647):

> "We can find no basis for saying that it is not fair and equitable, both in a technical as well as a general and non-technical sense, to require the stockholders to abide by their agreement in the very circumstances to which it was intended to apply, and where, as we have said, there is no contention that the contract when made was or is now oppressive, unfair, inequitable or illegal."

The District Court chose not to pass on this point. It said (R. 287a):

> "Certain common stockholders argue that this plan involves a true liquidation as distinguished from the fictitious liquidation involved in re United Light & Power Co., D. C. Del., 51 F. Supp. 247, aff'd. 3 Cir., 142 F. 2d 413, aff'd. sub. nom. Otis & Co. v. Securities and Exchange Commission, 323 U. S. 624, and that consequently the stock rights of the various security holders are not to be treated as though in a continuing enterprise. Since this is a true liquidation, the parties argue, the charter provisions do apply and therefore the preferreds are not entitled to a premium. The charter in this case provides that the preferreds shall be entitled to a premium only in the event that the winding up is voluntary; and this and other courts have held that where a company must change its capital structure because of the impact of the Act, the winding up or reorganization is not voluntary. See in re Consolidated Electric & Gas Co., D. C., Del., 55 F. Supp. 211; In re North Continent Utilities Corp., D. C., Del., 54 F. Supp. 527; City National Bank & Trust Co. of Chicago v. S. E. C. and North American Light & Power Co., 7 Cir., 134 F. 2d 65; New York Trust Co., et al. v. S. E. C., 2 Cir., 131 F. 2d 274. This is ingenious argument and, if accepted, would of course be dispositive of the holding that payment of the premiums would not be fair and equitable. I prefer not to definitely decide this particular point. * * *"

Should this Court issue its writ of certiorari as requested by the Commission and the other appellants, then we respectfully submit that it should likewise grant the petition of appellees for the issuance of a writ to determine this question, as well as the question of remand to the Commission.

Conclusion

For the reasons stated, the petition of Central Illinois Securities Corp., et al., for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit should be granted.

Dated: New York, N. Y., October 7, 1948.

Respectfully submitted,

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